Amri bin Ibrahim & Anor v Public Prosecutor and another appeal

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NOS 05–88–05 OF 2012(B) AND 05–89–05 OF 2012(B)
ARIFIN ZAKARIA CHIEF JUSTICE, ZULKEFLI CJ (MALAYA), RICHARD MALANJUM CJ (SABAH AND SARAWAK), SURIYADI AND HASAN LAH FCJJ
30 NOVEMBER 2016

Criminal Law — Appeal — Appeal against conviction and sentence — Appellants charged for trafficking methamphetamine under s 39B(1)(a) of the Dangerous Drugs Act 1952 and punishable under s 39B(2) of the Act — Courts below found appellants guilty of offence — Whether adverse inference should be drawn against prosecution for non-calling of material witnesses — Whether non-calling of witness fatal to prosecution's case — Whether appellants raised reasonable doubt — Whether convictions safe

Evidence — Witness — Failure to call witness — Appellants charged for trafficking methamphetamine under s 39B(1)(a) of the Dangerous Drugs Act 1952 and punishable under s 39B(2) of the Act — Courts below found appellants guilty of offence — Whether adverse inference should be drawn against prosecution for non-calling of material witnesses — Whether non-calling of witness fatal to prosecution's case — Dangerous Drugs Act 1952 s 39B(1)(a) & (2) — Evidence Act 1950 s 114(g)

Both the appellants were charged for the offence of trafficking in methamphetamine ('the drugs') under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') and punishable under s 39B(2) of the same. It was the prosecution's case that Chief Insp Loi Yew Lik ('PW4') who was also the agent provocateur had negotiated via a telephone call with one Eddy for the purchase of 500g of syabu. Thereafter, PW4 had met with both the appellants in room No 1508, Gold Course Hotel, Klang and further negotiated with them on the price of the drugs. PW4 accompanied by one of his friend by the name of Phee Chin Guan together with the second appellant then proceeded to room No 1911 where the offence was committed. While both the appellants were counting the money brought by PW4 in room No 1911, PW4 arrested both the appellants. The evidence of PW4 that both the appellants went to meet him in room No 1508 for the negotiation was corroborated with the testimony of Chief Insp Mohd Husni ('PW6'). Further, the bill from the hotel ('exh P19') showed that the first appellant had checked into the hotel on 15 January 2007 at 3.54pm and the front desk supervisor ('SP5') testified that room No 1911

was registered in the name of the first appellant on 15 January 2007 at 3.45pm. The appellants on the other hand denied any knowledge of the drugs and contended that Eddy was the one who had asked them to hand over the drugs to PW4 in room No 1911 while Eddy was looking for parking lot for his motorcar in the basement of the hotel. It was also the evidence of both the appellants that they had checked into the hotel at 10pm on 15 January 2017. At the end of the trial, the High Court found both the appellants guilty of the offence and sentenced them to mandatory death penalty. The appeals by both the appellants were dismissed by the Court of Appeal, hence the present appeals. The appellants submitted that in light of the consistencies between the evidence of both the appellants and the material discrepancies of the evidence of PW4 and PW6 as to the event which led to the arrest of the appellants, Phee Chin Guan ought to have been called by the prosecution as he was the only person present together with PW4 in room Nos 1508 and 1911. In addition, the second appellant also submitted that the prosecution's case was compromised when Eddy, the real trafficker of the drugs was not called as a witness. It was submitted that, adverse inference under s 114(g) of the Evidence Act 1950 ('the Act') ought to be invoked for the non-calling of both Phee Chin Guan and Eddy. In response, the prosecution submitted that the non-calling of both Phee Chin Guan and Eddy were not fatal as both of them played only a minimal role in this case.

Held, dismissing the appeals and affirming the convictions and sentences:

(1) The appellants' case that it was Eddy who handed over the drugs to the first appellant at the basement of the hotel as Eddy wanted to look for parking lot for his motorcar ('the appellants' case') could not be true as the key of the car was seized by PW4 from the first appellant. The court also found that both the appellants were not telling the truth when they told the court that they checked into the hotel at 10pm when exh 19 showed that the first appellant checked into the hotel at 3.54pm and SP5 testified that the first appellant registered with the hotel at 3.45pm. SP5 was not even cross-examined by the first appellant in this issue. Further, the evidence of PW4 that both the appellants went into room No 1508 to discuss about the sale of the drugs was corroborated with the testimony of PW6. On totality of the evidence, the Court of Appeal was correct in rejecting the appellants' case. The appellants' case was inherently improbable and inherently incredible (see paras 46–48 & 50).

(2) The court agreed with the Court of Appeal that adverse inference under s 114(g) of the Act ought not to be drawn against the prosecution for the non-calling of Phee Chin Guan as its witness as Phee Chin Guan was not a material witness to the prosecution to establish a prima facie case at the close of its case (see paras 56 & 58).

(3) The discrepancy in the evidence of PW4 and PW6 was minor and it did not affect the substance of the prosecution's case that both the appellants were arrested in room No 1911 and at the time of the arrests the drugs were also recovered from the room. Based on reasons given, the court agreed with the courts below that both the appellants had not raised any reasonable doubt on the prosecution's case, hence their convictions were safe (see paras 63–64).

[Bahasa Malaysia summary

Kedua-dua perayu telah dituduh kerana kesalahan mengedar dadah methamphetamine ('dadah tersebut') di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') dan boleh dihukum di bawah s 38B(2) yang sama. Ia adalah kes pendakwaan bahawa Ketua Insp Loi Yew Lik ('PW4') yang juga ejen provokasi telah berunding melalui panggilan telefon dengan Eddy untuk pembelian 500g syabu. Selepas itu, PW4 telah berjumpa dengan kedua-dua perayu di bilik No 1508, Gold Course Hotel, Klang dan selanjutnya berunding dengan mereka tentang harga dadah tersebut. PW4 telah ditemani salah seorang kawannya yang bernama Phee Chin Guan bersama dengan perayu kedua dan kemudian menuju ke bilik No 1911 di mana kesalahan itu berlaku. Semasa kedua-dua perayu sedang mengira wang yang dibawa oleh PW4 di bilik No 1911, PW4 telah ditangkap oleh kedua-dua perayu. Keterangan PW4 bahawa kedua-dua perayu telah bertemu dengannya di bilik No 1508 untuk perundingan itu telah disokong dengan keterangan Ketua Insp Mohd Husni ('PW6'). Selanjutnya bil daripada otel ('lampiran P19') menunjukkan bahawa perayu pertama telah masuk ke hotel itu pada 15 Januari 2007 pada pukul 3.54 petang. Perayu-perayu sebaliknya menafikan mempunyai apa-apa pengetahuan tentang dadah tersebut dan berhujah bahawa Eddy adalah orang yang meminta mereka menyerahkan dadah tersebut kepada PW4 dalam bilik No 1911 sementara Eddy mencari lot parkir untuk keretanya di bahagian bawah hotel tersebut. Ia juga keterangan kedua-dua peray ahawa mereka telah masuk ke hotel tersebut pada pukul 10 malam pada 15 Januari 2017. Di akhir perbicaraan, Mahkamah Tinggi mendapati kedua-dua perayu bersalah kerana kesalahan itu dan menjatuhkan hukuman mati mandatori ke atas mereka. Rayuan-rayuan oleh perayu-perayu telah ditolak oleh Mahkamah Rayuan, justeru rayuan-rayuan ini. Perayu-perayu telah berhujah bahawa berdasarkan kekonsistenan antara keterangan kedua-dua perayu dan percanggahan material keterangan PW4 dan PW6 berhubung kejadian yang membawa kepada tangkapan perayu-perayu, Phee Chin Guan yang patut telah dipanggil oleh pendakwaan kerana dia seorang sahaja yang hadir bersama PW4 di bilik-bilik No 1508 dan 1911. Tambahan, perayu kedua juga berhujah bahawa kes pendakwaan telah dikompromi apabila Eddy, pengedar sebenar dadah terrsebut tidak dipanggil sebagai saksi. Ia dihujahkan abhawa, inferens bertentangan di bawah s 114(g) Akta Keterangan 1950 ('Akta tersebut') patut digunakan untuk tidak memanggil kedua-dua Phee Chin Guan dan Eddy. Sebagai jawapan, pendakwaan berhujah bahawa tidak memanggil kedua-dua

Phee Chin Guan dan Eddy tidak memudaratkan kerana kedua-dua mereka hanya memainkan peranan kecil dalam kes ini.

Diputuskan, menolak rayuan-rayuan dan mengekalkan sabitan-sabitan dan hukuman-hukuman:

(1) Kes perayu-perayu bahawa ia adalah Eddy yang menyerahkan dadah tersebut kepada perayu pertama di bahagian bawah hotel tersebut kerana Eddy ingin melihat lot parkir untuk keretanya ('kes perayu') tidak mungkin benar kerana kunci kereta itu telah dirampas oleh PW4 dariapda perayu pertama. Mahkamah juga mendapati bahawa kedua-dua perayu tidak memberitahu kebenaran apabila mereka memberitahu mahkamah bahawa mereka telah masuk ke hotel pada pukul 10 malam walhal lampiran 19 menunjukkan bahawa perayu pertama telah masuk ke hotel pada 3.54 petang dan SP5 memberi keterangan bahawa perayu pertama telah berdaftar dengan hotel pada 3.45 petang. Malah SP5 tidak diperiksa balas oleh perayu pertama tentang isu ini. Selanjutnya, keterangan PW4 bahawa kedua-dua perayu pergi ke bilik No 1508 untuk membincangkan penjualan dadah tersebut telah disokong dengan keterangan PW6. Berdasarkan keseluruhan keterangan itu, Mahkamah Rayuan adalah betul dalam menolak kes perayu-perayu. Kes perayu-perayu memang mustahil dan memang luar biasa (lihat perenggan 46–48 & 50).

(2) Mahkamah bersetuju dengan Mahkamah Rayuan bahawa inferens bertentangan di bawah s 114(g) Akta tersebut tidak patut dibuat terhadap pendakwaan kerana tidak memanggil Phee Chin Guan sebagai saksinya kerana Phee Chin Guan bukan saksi utama kepada pendakwaan untuk membuktikan kes prima facie di penutup kesnya (lihat perenggan 56 & 58).

(3) Pertikaian dalam keterangan PW4 dan PW6 adalah kecil dan tidak menjejaskan kes pendakwaan bahawa kedua-dua perayu telah ditangkap di bilik No 1911 dan pada masa tangkapan itu dadah tersebut juga dijumpai daripada bilik itu. Berdasarkan alasan-alasan yang diberikan, mahkamah bersetuju dengan mahkamah bawahan bahawa kedua-dua perayu tidak menimbulkan apa-apa keraguan munasabah untuk kes pendakwaan, justeru sabitan-sabitan mereka adalah selamat (lihat perenggan 63–64).]

Notes

For cases on appeal against conviction and sentence, see 4(1) *Mallal's Digest* (5th Ed, 2015) paras 42–83.

For cases on failure to call witness, see 7(2) *Mallal's Digest* (5th Ed, 2015) paras 3504–3525.

Cases referred to

Herchun Singh & Ors v PP [1969] 2 MLJ 209, FC (refd)
Lau Song Seng & Ors v PP [1998] 1 SLR 663, CA (refd)
Mat v PP [1963] MLJ 263 (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169, SC (refd)
Munusamy v PP [1987] 1 MLJ 492, SC (refd)
PP v Chia Leong Foo [2000] 6 MLJ 705; [2000] 4 CLJ 649, HC (refd)
PP v Datuk Haji Harun bin Haji Idris (No 2) [1977] 1 MLJ 15 (refd)

Legislation referred to

Criminal Procedure Code s 182A
Dangerous Drugs Act 1952 ss 2, 39B(1)(a), (2)
Evidence Act 1950 s 114(g)

Appeal from: Criminal Appeal No B-05–245 of 2009 (Court of Appeal, Putrajaya)

Gooi Soon Seng (Gooi & Azura) for the first appellant.
Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the second appellant.
Aslinda bt Ahad (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Hasan Lah FCJ (delivering judgment of the court):

[1] Both the appellants were jointly charged in the High Court at Shah Alam for an offence of trafficking in dangerous drugs, to wit 342.1g of methamphetamine, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and punishable under s 39B(2) of the Act. The offence was committed on 16 January 2007 in room 1911, Gold Course Hotel, Klang.

[2] They were convicted of the offence as charged by the High Court and sentenced to death. Their appeals to the Court of Appeal were dismissed. They appealed against the decisions to this court.

[3] The prosecution's case is pivoted on the evidence of Chief Insp Loi Yew Lik ('PW4') from the Narcotics Department, Selangor Police Contingent who acted as the agent provocateur. It was the prosecution's case that on 15 January 2007, PW4 had contacted an Achenese male by the name of Eddy by telephone and telling him that he was interested in purchasing 500g of syabu. Eddy then asked PW4 to rent a room in Gold Course Hotel, Klang. Eddy also told PW4 that the price for 500g of syabu would be RM95,000. PW4 attempted to bargain for a lower price but Eddy told him to meet his friend to discuss on the price.

[4] As there was no Chinese officer in the department at that material time and for safety reasons, PW4 requested two of his Chinese friends by the names of Phee Chin Guan and Lee Kok Wai to accompany him to the Gold Course Hotel.

[5] PW4, together with his two Chinese friends and a raiding team led by ASP Som Chai and Chief Insp Mohd Husni bin Abdul Manaf ('PW6') arrived at the Gold Course Hotel at 11pm on the same day (ie 15 January 2007). PW4 and his two friends checked into room No 1508 whereas PW6 together with five other narcotic officers were stationed in room No 1511 opposite room No 1508, rented by PW4.

[6] On 16 January 2007 at 1am, PW4 received a telephone call from Eddy informing him that a person by the name of Amri would meet him in his room. Amri (subsequently identified as the first appellant) came to PW4's room at 1.30am and requested PW4 to show him the money. PW4 did so by unzipping his sling bag and showed him the RM90,000 photostated notes and RM5,000 genuine notes. The first appellant then demanded to look at the money, PW4 allowed him to examine the RM5,000 genuine notes but not the rest. The first appellant told PW4 that the 500g of syabu would be arriving in the morning.

[7] At 2.30am, another Achenese male by the name of Musliandy (subsequently identified as the second appellant) came to see PW4 in his room and again asked PW4 to show him the money which PW4 did. The second appellant then told PW4 that the drugs will be delivered to him at 11am and after 15 minutes he left the room.

[8] PW4, his two friends and the first appellant stayed in room 1508 until 9.30am. The first appellant then told PW4 that he is going out to take the drugs and in the meantime the second appellant would be joining them. At 9.40am after the first appellant left, the second appellant entered room 1508. The second appellant gave them the assurance that the drugs would arrive before 11am.

[9] At 12.30pm the second appellant informed PW4 that the drugs will be delivered in a different room. PW4 tried to persuade the second appellant to deliver the drugs in room No 1508 but to no avail.

[10] PW4 together with his friend, Phee Chin Guan then followed the second appellant to another room while, Lee Kok Wai, remained in room No 1508.

[11] Upon arrival at room No 1911, the second appellant opened the door by using an access card taken out from his pants pocket. PW4, Phee Chin Guan

and the second appellant then entered the room. There was no other person in the room.

[12] Evidence was led through the testimony of the hotel supervisor, Krishnan Bobby Raj (PW5), that room 1911 was registered in the name of the first appellant on 15 January 2007 at 3.45pm. The receipt for the deposit for the room (P18) was recovered from the first appellant's wallet.

[13] At 12.55pm the first appellant entered room No 1911. He was seen carrying a plastic bag (exh P11) in his right hand. The first appellant then handed over the plastic bag to PW4. PW4 examined its contents and found in it a transparent plastic bag wrapped in Chinese newspaper containing crystal-like substance.

[14] The second appellant then asked for the payment of the drugs from PW4. PW4 handed over to him the RM5,000 genuine notes and told him to count them first before giving him the balance. The second appellant gave some of the notes to the first appellant.

[15] While both the appellants were counting the money on the bed, PW4 identified himself as a police officer and arrested both the appellants with the assistance of PW6 and another police officer who rushed into the room.

[16] The drugs were sent to the chemist (PW3) by the investigating officer (PW7) for analysis. The chemist confirmed that the substance was methamphetamine weighing 342.1g.

[17] At the close of case for the prosecution the learned trial judge, after conducting a maximum evaluation of the prosecution evidence, found that a prima facie case had been made out against both the appellants for trafficking of the offending drugs by way of sale. This is evident from negotiations between PW4 and both the appellants for the sale of the offending drugs which culminated in the transaction being concluded in room 1911 of the Gold Course Hotel, Klang.

[18] The learned trial judge also found that the plastic bag P11 containing the offending drugs were delivered by the first appellant to PW4. The evidence also show that PW4 handed the genuine notes of RM5,000.00 to the second appellant and both the appellants counted the money while seated on bed.

[19] With regard to common intention, the learned trial judge made the following finding:

> The common intention of both accused is deducible from the act and conduct of

the first accused in calling on room 1508 at 1.30am and meeting SP4 and the negotiations as to the price at RM95,000 for the 500g of syabu, the counting of the sum of RM5,000 genuine notes and informing SP4 of the scheduled arrival of the incriminating drugs the next morning. As regards the second accused the element of common intention is deducible from the second accused's conduct of calling over at room 1508 at 2.30am and demanding sight of the sale consideration from SP4 and informing him of the scheduled arrival of the incriminating syabu the next morning. Upon the first accused handing over of the drugs fo SP4, the second accused demanded that SP4 hand over the sum of RM95,000 to him whereupon SP4 handed over the genuine notes of RM5,000 to the second accused who handed a part of it to the first accused to count. Both the accused counted the monies whilst seated on the bed in the room.

[20] Both the appellants elected to give evidence on oath. The first appellant's testimony, as summarised by the trial judge, was that he is an Achenese who came to Malaysia on 23 November 2005 and worked in a provision shop in Taman Medan, Petaling Jaya. The second appellant, who was from the same village in Acheh, came to his house on 12 January 2007 and requested his assistance to get a job for him and stayed with him.

[21] On 15 January 2007 the first appellant contacted his friend by the name of Eddy who was from the same village in Acheh and requested him for a loan of RM1,000. Eddy agreed to his request and informed the first appellant to meet him in Chow Kit, Kuala Lumpur. Both the appellants met Eddy and Eddy handed to the first appellant RM1,000.

[22] Eddy then asked both the appellants to accompany him to the Gold Course Hotel, Klang because he wanted to meet his friend by the name of Mukhlis. They then went to Klang in Eddy's motorcar, a Proton Satria, and arrived at the hotel at 10pm. At the hotel, Eddy asked the first appellant to book a room as Eddy did not bring along with him any document. They were allocated room No 1911 and they went up to the room and slept until the next morning, 16 January 2007. According to the first appellant before retiring to sleep he heard Eddy making telephone calls and receiving calls. He recalled that Eddy used the words 'barang-barang' and he did not know what it meant.

[23] At 11am the next morning (16 January 2007) they went to the hotel's lobby and the first appellant saw Eddy handing over the room's key to Mukhlis. All three of them went out for lunch and came back to the hotel at 1pm. Before entering the basement parking of the hotel Eddy took out an Amway bag from the boot of his car and handed it over to the first appellant and informed both the appellants to bring the bag to room No 1911 and hand over the bag to a male Chinese. Eddy said he would meet them in room No 1911 after parking the motorcar.

[24] Without suspecting anything, both the appellants went over to room 1911 to hand over the Amway bag as directed. There were three persons, two male Chinese and Mukhlis in the room. The first appellant then handed the Amway bag to a male Chinese whom he later came to know during the trial was PW4 and told him that the bag was from Eddy and the first appellant did not request any monies from PW4. He further testified that there were no negotiations held between both the appellants and PW4 nor was there any monies handed over to them. PW4 then identified himself and arrested both the appellants and Mukhlis and they were brought to Klang Police Station.

[25] The first appellant also testified that after lunch and before going back to the hotel he saw Eddy meeting a male Chinese who handed a bag to Eddy who placed it in the boot of his car. He identified the bag as the Amway bag (P11) that he handed over to PW4. He denied knowledge of the drugs and contrary to PW4's testimony he also did not negotiate for the sale of the drugs. He also claimed that he did not request to see the monies and count the RM5,000 as alleged.

[26] The second appellant's testimony by and large was similar to that of the first appellant particularly in relation to the sequence of events which led to his arrest. He denied any knowledge of the contents of the bag P11 or demanding to see the monies and informing SP4 of the scheduled delivery of the drugs. He denied having anything to do with the offending drugs and participation in the negotiations for the sale of the drugs.

[27] At the end of the case the learned trial judge made a finding that the character by the name of Eddy did exist but that did not raise any doubt in favour of both the appellants. The learned trial judge gave the following reasons:

> Upon a careful examination of the totality of the evidence presented I have arrived at the conclusion that it does not raise any doubt in favour of both accused. My conclusion is predicated by the fact that SP4 in his testimony never attempted to suppress the existence and role of Eddy. I accept his testimony that Eddy's role was minimal and upon his suggestion SP4 carried out negotiations which culminated in the successful conclusion of the sale transaction of the drugs. There is also the undisputed evidence of the receipt for the deposit of the Hotel room marked P18 which was found in the wallet of the first accused for which no explanation was rendered. Then there was the unexplained set of keys of the Proton Satria found on the first accused. If Eddy was driving the Proton Satria then surely the car keys should be with Eddy.
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> The accused's testimony is in opposite contrast to that of SP4 and SP6 which raises the issue of credibility.
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> I have upon a maximum re-evaluation of all the evidence adduced am satisfied that the evidence of SP4 and SP6 is credible for acceptance.

The submission of learned defence counsel in connection with D21 of the accused alluding to Eddy requesting the first accused to use his foreign visitor's pass to register for room 1911 cannot in the factual matrix herein be construed as evidence of facts to found an order of acquittal more so in the face of the contradiction as to the document that was used to register for the room as can be seen by the scheme of defence question to prosecution's witness which was that the first accused passport used but during the defence the first accused stated the foreign visitor's pass was used.

[28] Having considered both the prosecution and defence evidence in its entirety the learned trial judge found that both the appellants failed to raise any reasonable doubt on the charge of trafficking and the prosecution had proved its case against both the appellants beyond reasonable doubt.

THE APPEAL

[29] Learned counsel for the first appellant submitted that the defence had raised doubt in the prosecution's case especially when the prosecution failed to call Phee Chin Guan to rebut the first appellant's evidence. At the material time only PW4, Phee Chin Guan and both the appellants were inside room No 1911.

[30] It was submitted that since the evidence of both the appellants was consistent with each other and remained unshaken even after vigorous cross-examination by the prosecution, the only way of rebutting the defence of the appellants was to call Phee Chin Guan as a prosecution witness as he was the only person present together with PW4 in room No 1508 and room No 1911, where both of the appellants were arrested. In light of the evidence of the appellants, it becomes necessary to call Phee Chin Guan at the end of the defence case to rebut the defence failing which the adverse inference under s 114(g) of the Evidence Act 1950 may be invoked against the prosecution. In support of that proposition learned counsel cited a passage from *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705; [2000] 4 CLJ 649.

[31] Learned counsel for the first appellant also submitted that there were material discrepancies between the evidence of PW4 and PW6. In the circumstance Phee Chin Guan ought to have been called by the prosecution as he was the only person who could have confirmed the evidence of PW4 in light of the discrepancies.

[32] Learned counsel for the second appellant adopted the submission of learned counsel for the first appellant and further added that the case for the prosecution had been compromised when Eddy was not called as a witness for the prosecution or offered to the defence. The defence's case was that the real trafficker of the offending drugs was Eddy and the bag which contained the

offending drugs belonged to Eddy. It was Eddy who rented room No 1911 using the first appellant's name. PW4 contacted Eddy and discussed with him on the purchase of the offending drugs. Eddy told PW4 that 100 set of syabu would cost RM95,000. As such the adverse inference under s 114(g) of the Evidence Act 1950 ought to be invoked against the prosecution for not calling Eddy, who was a material witness for the prosecution.

[33] In response, learned deputy public prosecutor submitted that the non-calling of Eddy and Phee Chin Guan was not fatal to the prosecution's case. Phee Chin Guan and Eddy played only a minimal role in this case. From the evidence it was clear that the sale and purchase of the offending drugs were between PW4 and both the appellants.

DECISION

[34] According to the prosecution's case Eddy was the first person contacted by PW4 in relation to the sale and purchase of the offending drugs. The first contact was made on 15 January 2007 whereby PW4 informed Eddy that PW4 was interested in purchasing 500g of syabu. Eddy told PW4 that the price for 500g of syabu would be RM95,000 and Eddy then asked PW4 to rent a room in the Gold Course Hotel, Klang.

[35] The second contact between PW4 and Eddy was at 1am on 16 January 2007 when PW4 received a telephone call from Eddy informing him that a person by the name of Amri (subsequently identified as the first appellant) would meet him in his room. By that time PW4 had already checked into room No 1508 at the Gold Course Hotel. After that there was no more communication between PW4 and Eddy.

[36] The defence's version was that both the appellants accompanied Eddy to the Gold Course Hotel on 15 January 2007 as Eddy wanted to meet his friend by the name of Mukhlis. They arrived at the hotel at around 10pm and booked a room under the first appellant's name as Eddy did not bring any document with him. They were allocated room No 1911.

[37] All three of them went up to the room and slept until 9am the next morning (ie 16 January 2007). This part of the evidence was also corroborated by the cautioned statement of the first appellant (exh D21).

[38] At around 11am the next morning, both the appellants and Eddy went down to the hotel's lobby where Eddy handed over the room's key to Mukhlis. The appellants and Eddy then went out for lunch and came back to the hotel at around 1pm. Before entering the carpark at the basement of the hotel, Eddy took out a plastic bag from his car boot and handed it to the first appellant.

Eddy then asked the appellants to bring the plastic bag to room No 1911 and hand it over to a Chinese man there and Eddy would meet them in the room after he had parked his car.

[39] The learned trial judge's finding was that the initiation of the sale transaction was between PW4 and Eddy but Eddy's role ended after the telephone conversation with PW4 when Eddy specifically informed PW4 that the negotiation for the reduction of the sale price was to be conducted with the first appellant. The prosecution's evidence showed that Eddy did not at anytime meet PW4 physically to negotiate the transaction.

[40] The learned trial judge also found that there was ample and credible evidence that subsequent negotiation (which took place at Hotel Gold Course) was conducted actively by both the appellants with PW4. As such the learned trial judge found that the involvement of Eddy did not and could not exculpate both the appellants' role in the light of the overwhelming evidence of their active participation in the sale transaction.

[41] At the end of the case the learned trial judge asked the pertinent question, whether Eddy's existence and participation in the case had raised a reasonable doubt in the case against both the appellants. The learned trial judge answered the question emphatically that it did not raise any reasonable doubt in the prosecution's case against both the appellants.

[42] It was noted by the learned trial judge in his judgment that the appellants' testimonies were contrary to that of PW4 and PW6 which therefore raised the issue of credibility. The learned trial judge found the evidence of PW4 and PW6 to be credible.

[43] The main ground of appeal before the Court of Appeal was that the appellants were innocent carriers and had no knowledge of the offending drugs contained in the plastic bag. It was argued that the real culprit was Eddy with whom PW4 had negotiated for the sale of the offending drugs.

[44] The Court of Appeal however was not persuaded by the argument. The Court of Appeal agreed with the findings of the learned trial judge on Eddy's role in this case. The Court of Appeal also held that the learned trial judge had rightly rejected the first appellant's defence. It held that on the facts of the case the initial telephone negotiations for the sale of the offending drugs between PW4 and Eddy did not absolve the first appellant from culpability.

[45] According to the Court of Appeal the appellants, by their overt acts and conduct clearly showed that they were not innocent carriers who had no

knowledge of the offending drugs in the plastic bag. In the Court of Appeal's view it was a clear case of trafficking in dangerous drugs within the meaning of s 2 of the Act.

[46] We are in agreement with the findings of the courts below on Eddy's role and in rejecting the defence's case that it was Eddy who handed the bag containing the offending drugs to the first appellant at the basement of the hotel as Eddy wanted to look for parking lot for the motorcar. As rightly noted by the learned trial judge that version could not be true because the key for the car was seized by PW4 from the first appellant. If the first appellant's version was true the key of the car should have been with Eddy and not with him.

[47] In his testimony, the first appellant said that they (both the appellants and Eddy) arrived at the hotel at about 10pm on 15 January 2007 and they went to room No 1911. They went to sleep at about 10pm. The second appellant, in his testimony, also said they arrived at the hotel at 10pm on 15 January 2007. However, the particulars printed on exh P19, the bill from the hotel, did not support their story. P19 shows that the first appellant checked into the hotel at 3.54pm on 15 January 2007. SP5, the supervisor at the front desk of the hotel stated in his evidence that the first appellant registered with the hotel at 3.45pm PW5 was not even cross-examined by counsel for the first appellant on this issue. We hold that both the appellants were not telling the truth when they told the court that they checked into the hotel at 10pm on 15 January 2007.

[48] Both the appellants denied PW4's version that the first and second appellants went to meet him in room No 1508 to discuss about the sale of the offending drugs and to see whether PW4 had the money with him. PW4's evidence on this point was corroborated by the evidence of PW6, Chief Insp Mohd Husni bin Abdul Manaf, who occupied room No 1511 which was infront of room No 1508. He testified that he saw the first appellant went to room No 1508 at 1.30am and the second appellant went to the room at 2.30am.

[49] There was nothing improbable about the evidence of PW4 that both the appellants came to room No 1508 to discuss about the sale of the offending drugs in the early morning of 16 January 2007 as both the appellants were staying in the same hotel at that time. Their explanation that they went to the hotel just to accompany Eddy who wanted to meet Eddy's friend by the name of Mukhlis there was not at all credible. If Eddy just wanted to meet Eddy's friend at the hotel there why was the need for them to put up for the night in the hotel.

[50] Based on the entirety of evidence before the court, we find the learned trial judge and the judges of the Court of Appeal were correct in rejecting the first appellant's defence that it was Eddy who handed him the drugs and that he had no knowledge of the offending drugs in the plastic bag. His version was therefore not only inherently improbable but also inherently incredible. Furthermore there was no reason for the court to disbelieve the evidence of PW4 and PW6. Both of them did not even know the two appellants. There was no reason for PW4 and PW6 to embellish their evidence or to manufacture evidence against both the appellants.

[51] It is trite law that the view of the trial judge as to the credibility of a witness must be given proper weight and consideration. An appellate court should be slow in disturbing such finding of fact arrived at by the trial judge, who had the advantage of seeing and hearing the witness, unless there were substantial and compelling reasons for disagreeing (see *Herchun Singh & Ors v Public Prosecutor* [1969] 2 MLJ 209).

NON-CALLING OF PHEE CHIN GUAN

[52] Learned counsel argued that even though the evidence of Phee Chin Guan may not be material at the close of the prosecution's case, in light of the evidence of the appellants, which were consistent with each other and remained unshaken even after vigorous cross-examination by the prosecution, the only way of rebutting the defence of the appellants was to call Phee Chin Guan as a prosecution witness as he was the only person that was present together with PW4 initially in room No 1508 and later in room No 1911.

[53] It is trite law that the discretion lies with the prosecution to call all such witnesses as are essential to the unfolding of the narrative on which the prosecution's case is based. Phee Chin Guan was not called as a prosecution's witness because according to the prosecution, the unfolding of the narrative was sufficient through the evidence of PW4. In any event, Phee Chin Guan was offered to the defence at the close of the prosecution's case.

[54] At the end of a trial s 182A of the Criminal Procedure Code imposes a duty on a trial court to consider all the evidence adduced before it and to decide whether the prosecution has proved its case beyond reasonable doubt.

[55] Whenever a criminal case is decided on the basis of the truth of the prosecution's case as against the falsity of the defence story, a trial judge must in accordance with the principle laid down in *Mat v Public Prosecutor* [1963] MLJ 263 go one step further before convicting an accused by giving due consideration as to why the defence story, though could not be believed, did not raise any reasonable doubt in the prosecution case (see *Mohamad Radhi bin*

Yaakob v Public Prosecutor [1991] 3 MLJ 169). This was done by the learned trial judge.

[56] The issue of the non-calling of Phee Chin Guan was argued before the Court of Appeal by the defence. The Court of Appeal held inter alia that Phee Chin Guan was not an essential or material witness to the prosecution in order to establish a prima facie case at the close of its case or to prove its case beyond reasonable doubt at the end of the defence case and the non-calling of Phee Chin Guan did not leave a gap in the prosecution's case. It was also held that on the facts of the case, the learned trial judge did not err in not invoking s 114(g) of the Evidence Act 1950 against the prosecution.

[57] The power of the court to draw an adverse inference under s 114(g) of the Evidence Act 1950 is discretionary. It depends on the circumstances of the case and particularly in cases where the material witnesses are not produced (see *Lau Song Seng & Ors v Public Prosecutor* [1998] 1 SLR 663). The scope of s 114(g) has been explained by the Supreme Court in *Munusamy v Public Prosecutor* [1987] 1 MLJ 492 at p 494:

> ... It is essential to appreciate the scope of s 114(g) lest it be carried too far outside its limit. Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document, but material document by a party in his possession, or for non-production of not just any witness but an important and material witness to the case.

[58] On the facts of the case we agree with the finding of the Court of Appeal that adverse inference under s 114(g) of the Evidence Act 1950 ought not to be drawn against the prosecution for not calling Phee Chin Guan as its witness. We agree with the reasons given by the Court of Appeal.

CONTRADICTION BETWEEN THE EVIDENCE OF PW4 AND PW6

[59] Learned counsel for the first appellant contended that there was a material contradiction in the evidence of PW4 and PW6 relating to the events which led to the arrest of the appellants in room No 1911. According to learned counsel PW4 testified that he entered room No 1911 together with Phee Chin Guan and the second appellant. The first appellant came at 12.55pm and entered the room as well. PW4 identified himself as a police officer when both the appellants were engrossed in counting the monies received from PW4. PW4 then asked Phee Chin Guan to open the door and he also called PW6 through a mobile phone. PW6 arrived together with one detective L/Cpl Azrul 30 seconds later.

[60] However, PW6 in his evidence-in-chief said as follows:

Saya bersama anggota saya telah keluar bilik 1511 dan menggunakan tangga kecemasan sampai ke tingkat 19 dimana saya melihat C/Insp. Loi telah berada di hadapan pintu bilik dimana kedua-dua OKT berada. C/Insp Loi mengenalkan diri sebagai polis dan saya bersama anggota saya menangkap kedua-dua OKT dalam bilik.

[61] It was submitted that in light of the material discrepancy between the evidence of PW4 and PW6, the evidence of PW4, upon which the prosecution case rests, is suspect. In the circumstances Phee Chin Guan ought to be called by the prosecution as he was the only person who could have confirmed the evidence of PW4.

[62] It is important to note that every witness does not remember the same thing and he does not remember accurately every single thing that happened. There is no rule of law that the testimony of a witness must either be believed in its entirety or not at all. A court is fully competent, for good and cogent reasons, to accept one part of the testimony of a witness and to reject the other (see *Public Prosecutor v Datuk Haji Harun bin Haji Idris (No 2)* [1977] 1 MLJ 15).

[63] Having carefully considered the relevant part of the evidence of PW4 and PW6, we find the discrepancy in their evidence is minor and it did not affect the substance of the prosecution's case. The substance of their evidence was that both the appellants were arrested in room No 1911 and at the time of their arrests the offending drugs were also recovered from the room. There was no contradiction in their evidence in respect of that.

CONCLUSION

[64] For the reasons given we agree with the findings of the courts below that both the appellants have not raised any reasonable doubt on the prosecution's case or as to their guilt and that the prosecution has proved the case against both the appellants on the offence charged beyond reasonable doubt. On the facts of the case their convictions are safe. Accordingly we dismiss their appeals. Their convictions and sentences are affirmed.

Appeals dismissed; convictions and sentences affirmed.

Reported by Dzulqarnain Ab Fatar